Supreme Court, U.S.
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Docket No._____

SUPREME COURT OF THE UNITED STATES
OCTOBER 1997 TERM

DOUGLAS W. SCOTT,	)	
	)	
Petitioner,	)	ON PETITION FOR WRIT
	)	OF CERTIORARI TO THE
v.	)	UNITED STATES COURT
	)	OF APPEALS FOR THE
UNITED STATES OF AMERICA,	)	SEVENTH CIRCUIT
	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

DOUGLAS W. SCOTT
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WHEATON, IL 60187
1-630-668-2997

39 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 CONSTRUCTIVE AMENDMENT

Were the substantial rights of the Scotts under the Fifth and Sixth Amendments to the Constitution violated when (1) trial evidence, and (2) a jury instruction on false writing combined to broaden charges thus causing a constructive amendment to the indictment by two means? First, by allowing the jury to consider a different offense by means of the three additional SEC Form D's not charged in the indictment but presented at trial. And, second, by trying the Scotts on a less specific offense than that charged in the indictment, i.e., any one of the 44 allegedly false statements made to the SEC rather than the mail fraud scheme charged in the indictment.

QUESTION 2 PROSECUTORIAL MISCONDUCT

Were the Scotts deprived of their liberty without due process of law as required by the Fifth and Fourteenth Amendments to the Constitution of the United States by the prosecutors' failure to notify the Scotts, as required by Fed.R.Crim.Proc.(16)(a)(1)(E), of their intended use of Mr. Jonikas as an expert witness and by the prosecutors' knowing use of Mr. Jonikas to present false testimony?

QUESTION 3 ACTUAL AMENDMENT

Were the substantial rights of the Scotts under the Fifth and Sixth Amendments to the Constitution violated when the district court, prior to the trial, granted the prosecutors' motion to physically amend the indictment without resubmission of the indictment to the grand jury? The amendment struck the bankruptcy aspect of the indictment which was the heart of the alleged bankruptcy scheme to defraud. Defenses available to the Scotts under the indictment as it originally stood were no longer available to the Scotts after the amendment was made.

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A STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. at 3231, 18 U.S.C. at 1962(c) and (d), and 18 U.S.C. at 1341. On April 28, 1995, the district court entered the final judgment order as to Mr. Richard E. Scott which was docketed on May 2, 1995. On April 28, 1995, the district court entered the final judgment order as to Mr. Douglas W. Scott, which was docketed on May 3, 1995. Mr. Douglas W. Scott filed a notice of appeal on May 4, 1995. Mr. Richard E. Scott filed a notice of appeal on May 5, 1995.

The Seventh Circuit Court of Appeals had jurisdiction pursuant to 18 U.S.C. at 3742(a)(1) and 28 U.S.C. at 1291. A panel of the Seventh Circuit Court of Appeals in an unpublished order (Sh.App. at 1) affirmed the convictions of the Scotts on March 19, 1997. On March 31, 1997 the Scotts filed a petition for rehearing and rehearing en banc. On July 1, 1997 the Seventh Circuit denied the Scotts' petition (Sh.App. at 11).

The Supreme Court of the United States has jurisdiction pursuant to U.S. Sup. Ct. Rule 10(a), 28 U.S.C.A.

A STATEMENT OF THE CASE

I. THE NATURE OF THE CASE.

Mr. Richard E. Scott and Mr. Douglas W. Scott were indicted on March 22, 1992. A superseding indictment followed on April 2, 1992. Unless otherwise indicated herein, when the word "indictment" is used hereafter, it will mean the superseding indictment. The indictment charged both Scotts with one count each of RICO and RICO conspiracy, and 67 counts of mail fraud. Mr. Richard E. Scott was also charged with one count of making a false statement to the SEC.

The charges focused on an alleged bankruptcy scheme to defraud as described in the indictment. The alleged scheme to defraud alleged misrepresentations, false statements, omissions and false promises in the Confidential Offering Memorandums (COM's) of five limited partnerships organized by the Scotts (Mortgage Fund VII, Group 54 Partnership, Wheaton Oaks Partners, Group 61 Partnership and TGS-84 Partnership) and a letter of credit transaction.

II. THE COURSE OF THE PROCEEDINGS.

Jury selection for the trial in the United States District Court with the Honorable Judge Charles Norgle presiding began on November 21, 1994. Mr. Scott Mendeloff and Mr. Jon Bunge, Assistant United States Attorneys, represented the government. Mr. Rick Halprin and Mr. Jim Graham, appointed counsel, represented Mr. Richard E. Scott and Mr. Douglas W. Scott, respectively.

III. THE DISPOSITION IN THE DISTRICT COURT.

The prosecution rested on December 27, 1994 (TR 3023 line 23). The Scotts' motion for a directed verdict under Rule 29 was denied (TR 4139 line 1-13). An agreed order to dismiss with prejudice 23 of the mail fraud counts against both defendants was granted on December 29, 1994 (TR 3030 lines 1-7). The Scotts' motion for a judgment of acquittal as to the remaining counts was denied. The trial's closing arguments and jury instructions occurred on January 30, 1995. The jury deliberated and returned its verdict on January 31, 1995. The jury found the Scotts guilty on all remaining counts. A post trial motion for judgment of acquittal notwithstanding the verdict, or alternatively a motion for new trial, adopted by both defendants, raising 31 issues, was denied. Sentencing was held on April 28, 1995. Mr. Richard E. Scott was sentenced under the old law to five years imprisonment, six years of probation and restitution of $4,270,620. Mr. Douglas W. Scott was sentenced under the old law to three years imprisonment, six years of probation and restitution of $4,270,620. A copy of both judgments in the criminal case are included in the Appendix at 9-16. The government's motion to dismiss the original indictment was granted (TR 4486 line 20-TR 4487-line 2).

The Scotts self-surrendered to the Federal Prison Camp in Oxford, WI on June 27, 1995. Mr. Richard E. Scott is still incarcerated there. Mr. Douglas W. Scott was released from Oxford on July 8, 1997 and presently resides at 1465D Woodcutter Lane in Wheaton, Illinois. Notices of appeal were timely filed.

Motions for bond pending appeal were denied by both the district court and the Seventh Circuit Court of Appeals.

IV. THE DISPOSITION IN THE SEVENTH CIRCUIT COURT OF APPEALS.

The Seventh Circuit Court of Appeals in an unpublished order affirmed the convictions of the Scotts on March 19, 1997 (Sh.App. at 1). On March 31, 1997, the Scotts filed a petition for rehearing and rehearing en banc. On July 1, 1997 the Seventh Circuit denied the Scotts' petition (Sh.App. at 11).

V. THE STATEMENT OF FACTS.

Mr. Richard E. Scott and Mr. Douglas W. Scott joined with their father in a business known as Investors Real Estate (TR 3111 line 24-TR 3112 line 22). Mr. Richard E. Scott started in 1969 (TR 3089 lines 13-14). Mr. Douglas W. Scott started in 1977 (TR 3111 line 24-TR 3112 line 9). The Scotts developed limited partnerships and by March, 1985 were operating more than 70 different business entities (TR 3079 lines 6-18). The indictment focuses on six limited partnerships (out of a total of more than 18 limited partnerships (TR 3117 lines 10-14)) and a letter of credit transaction promoted by the Scotts from 1983 through 1985.

Mortgage Fund VII's Confidential Offering Memorandum (COM) is dated September 19, 1983 (Appendix at 23-24; Ex A). Mortgage Fund VII subscribed $485,000 (TR 503 lines 15-17). Group 54 Partnership's COM is dated February 23, 1984 (Appendix at 25-26; Ex B). Group 54 Partnership subscribed $1,100,000 (TR 503 lines 8-10). Group 61 Partnership's COM is dated August 20, 1984 (Appendix at 27-28; Ex C). Group 61 Partnership subscribed $700,000 (TR 690 lines 6-7). Wheaton Oaks Partners' COM is dated September 7, 1984 (Appendix at 29-30 Ex D). Wheaton Oaks Partners subscribed $700,000 (TR 804 lines 11-17). TGS-84 Partnership's COM is dated October 29, 1984 (Appendix at 31-32 Ex E). TGS-84 Limited Partnership subscribed $742,500 (TR 975 lines 21-25). The letter of credit COM is dated March 1, 1985 (Appendix at 33; Ex F). The letter of credit transaction subscribed $1,300,000.

Mortgage Fund VII was not able to purchase the industrial revenue development bonds it was formed to purchase (TR 3178 line 24-TR 3179 line 17). Investors who had purchased $435,000

of Mortgage Fund VII invested that money in Group 54 Partnership (TR 479 lines 21-24).

Group 54 Partnership, Wheaton Oaks Partners, Group 61 Partnership and TGS-84 Partnership were collectively referred to as the office building partnerships (TR 3291 lines 9-24). Each of the four partnerships purchased one or more of five office building condominiums developed by an affiliate of the Scotts (Ex B-5; Ex B-5a; Ex C-9; Ex D-17; Ex E-109). In addition, Group 54 Partnership purchased 7.717 acres in West Chicago, Illinois (Ex B-9) and 24 lots in McHenry County, Illinois (Ex B-15). Group 61 Partnership purchased vacant land at 63rd and Belmont in Downers Grove, Illinois (Ex C-13). Wheaton Oaks Partners purchased vacant land located on Lake Street in Streamwood, Illinois (Ex D-8). TGS-84 Partnership purchased a 16.7 percent portion of Group P Partnership, another affiliated partnership of the Scotts (TR 913 lines 3-5). The prosecution, using the Scotts' documents, demonstrated at trial that each partnership purchased the properties it promised, from affiliates of the Scotts, for exactly the price disclosed in the COM's to the investors (Ex B at 6-7, Ex B-5; Ex B-5a; Ex B-9; Ex B-15; Ex C at 6-7, Ex C-9; Ex D at 6-7, Ex D 17; Ex E at 6-7, Ex E-10a).

The prosecution, again using the Scotts' documents, demonstrated that the Scotts had purchased the 7.717 acres, the 24 lots, and the land in both Downers Grove and Streamwood for substantially less than the price paid for them by the Partnerships (Ex B-7; Ex B-13; Ex C-12; Ex D-20). The documents also showed that the purchases by the Scotts were recent and that neither their recent purchase nor the lower prices were disclosed to the investors (TR 386 line 11-TR 590 line 2; TR 592 line 9-TR 595 line 4; TR 746 lines 1-23; TR 854 line 2-TR 855 line 7).

The prosecution, relying on the testimony of Mr. Al Jonikas, a Certified Public Accountant (TR 364 lines 19), a full-time employee of the United States District Attorney's office (TR 364 lines 23-24) and the case agent in this case (TR 73 line 14), alleged that much of the partnerships' proceeds were spent for purposes unrelated to the partnerships (TR 975 lines 8-13). Allegedly, Group 54 Partnership spent $510,876.92 on purposes unrelated to the partnership (Ex Group 54 Cash Flow Chart A). Allegedly, Group 61 Partnership spent $625,026.56 on purposes

unrelated to the partnership (TR 727 lines 18-19). Allegedly, Wheaton Oaks Partners spent $666,929 on purposes unrelated to the partnership (TR 816 lines 18-19). And, allegedly TGS-84 Partnership spent $607,334.05 on purposes unrelated to the partnership (TR 952 lines 6-9).

Each of the office building partnerships provided that the money subscribed could be spent to pay fees to the Scotts and affiliates of the Scotts (Ex B at 8; Ex C at 8; Ex D at 8; Ex E at 8), to pay partnership expenses (Ex B at 117; Ex C at 108; Ex D at 108; Ex E at 108), to pay the Scotts or affiliates of the Scotts their equity in the purchased properties (Ex B at 5-6; Ex C at 5-6); Ex D at 5-6; Ex E at 5-6) and authorized the Scotts to borrow the rest (Ex B at 113; Ex C at 108; Ex D at 108; Ex E at 108). The prosecution contended at trial that the borrowing aspect was not adequately disclosed (TR 3441 line 11-TR 3449 line 3).

Each of the four office building partnerships had a double option provision (Ex B at 7; Ex C at 7; Ex D at 7; Ex E at 7). The first option gave the limited partners the option to require the general partners to purchase their interests in the partnership for 112 percent of the limited partners' initial purchase price at the end of four years (EX B at 7; Ex C at 7; Ex D at 7; Ex E at 7). The second option gave the general partners the option to purchase the interests of the limited partners for 112 percent of the limited partners' purchase price at any time during the first four years of the partnership (Ex B at 7; Ex C at 7; Ex D at 7; Ex E at 7). The double option provision was a provision that made an investment in the partnership similar to a loan (TR 3244 lines 7-TR 3245 line 24). The limited partners were able to get out at a profit without concern about the purchase price of the properties (TR 3186 lines 17-20).

Each of the limited partners executed a limited partnership agreement in which he affirmatively represented to the Scotts that he had received a COM, was familiar with each provision of the limited partnership agreement and met the suitability requirements set forth in the COM (Ex B; Ex C; Ex D; Ex E). A copy of the suitability requirements and the signature pages of the Group 54 Partnership COM is in the Appendix at 37-39. These pages are similar to the suitability requirements and signature pages in each of the three other office building partnerships (Ex C; Ex D; Ex E).

The prosecution demonstrated that Mr. Richard E. Scott had signed the TGS-84 Partnership SEC FORM D (TR 3780 lines 1-6) and the answer given to question 6b on that form was not the answer preferred by the prosecution (TR 3781 line 1-TR 3785 line 9).

The Scotts' September 30, 1984 personal financial statement showed a combined net worth of $4,532,560 (TR 2650 line 13). At trial, Mr. Thullen, an expert witness for the government (TR 2626 lines 4-14), testified that the Scotts' net worth on December 31, 1984 was allegedly a negative $2,150,706 (TR 2745 lines 14-15). Mr. Thullen, based his testimony in part on his determination that Elwyn, Willbert & Haig (EWH) and IRE Investments, Inc. were worthless (TR 2670 lines 18-21; TR 2672 lines 8-10) and that the Scotts had allegedly undisclosed liabilities of $3,734,924 (TR 2744 lines 20-TR 2745 line 1).

Mr. Thullen's valuation of EWH was based on his conclusion that a $426,600 receivable from Tara Farms, another Scott affiliate, was not collectible because Tara Farms had insufficient assets to pay it (TR 2666 line 10-TR 2667 line 25; TR 2671 lines 5-11). Mr. Thullen failed to reveal that Tara Farms owned free and clear at least $6,000,000 of horses, far more than enough to pay the $426,600 amount owed to EWH (TR 3829 lines 15-25).

Mr. Thullen's testimony that IRE Investments, Inc. was worthless was based on his conclusion that IRE Investments, Inc.'s investment in Muluki Bloodstock, another affiliate of the Scotts, was worthless (TR 2672 lines 8-10). Mr. Thullen failed to reveal to the jury at least the $6,000,000 of horses owned free and clear by Tara Farms, which was enough to justify the Scotts' value of IRE Investments, Inc. since Muluki Bloodstock held a major ownership interest in Tara Farms (TR 3842 line 14-TR 3843 line 12).

Mr. Thullen's testimony about allegedly undisclosed liabilities of $3,734,924 was incorrect. He failed to determine whether or not the liabilities had been disclosed already in other entities of the Scotts or whether or not they had been used by the Scotts to purchase assets or pay down or off other liabilities, which would then have created a wash (TR 2819 line 1-TR 2820 line 21; TR 2781 line 4-TR 2797 line 5; TR 2847 line 23-TR 2848 line 8).

VI. A STATEMENT OF APPELLATE JURISDICTION

Mr. Douglas W. Scott and Mr. Richard E. Scott were tried in the United States District Court for the Northern District of Illinois Eastern Division in criminal case 92 CR 226 with the Honorable Judge Charles R. Norgle, presiding. Both were convicted of violations of Title 18 U.S.C. Sections 1962(c), 1962(d), and 1341. Richard E. Scott was additionally convicted of a violation of Title 18 U.S.C. Section 1001. They appealed their convictions. Jurisdiction was invoked pursuant to 28 U.S.C. Sections 3742(a)(1)and 1291. Final judgment was entered on April 28, 1995 and disposed of all claims with respect to all parties.

QUESTION 1 CONSTRUCTIVE AMENDMENT

Were the substantial rights of the Scotts under the Fifth and Sixth Amendments to the Constitution violated when (1) trial evidence, and (2) a jury instruction on false writing combined to broaden charges thus causing a constructive amendment to the indictment by two means? First, by allowing the jury to consider a different offense by means of the three additional SEC Form D's not charged in the indictment but presented at trial. And, second, by trying the Scotts on a less specific offense than that charged in the indictment, i.e., any one of the 44 allegedly false statements made to the SEC rather than the mail fraud scheme charged in the indictment.

The Seventh Circuit Court of Appeals has entered a decision in conflict with the decision of the other United States Courts of Appeals on the same important matter.

Constructive amendments of federal indictments are error per se and must be corrected on appeal. U.S. v. Floresca, 38 F.3d 706, 714 (4th Cir.1994) citing Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270,273, 4 L.Ed.2d 252. United States V. Dunn, 758 F.2d 30,36 (1st Cir.1985); United States v.Zingaro, 858 F.2d 94,103 (2nd Cir.1988); United States v. Somers, 496 F.2d 723,744 (3rd Cir.) cert.denied, 419 U.S. 832, 95 S.Ct. 56, 42 L.Ed 2d 58 (1974); United States v. Young, 730 F.2d 221,223 (5th Cir.1984); United States v. Hathaway, 798 F.2d 902,910 (6th Cir.1986); United States v. Yeo, 739 F.2d 385,387 (8th Cir. 1984); United States v. Von Stoll, 726 F.2d 584, 586 (9th Cir.1984);

United States v. Apodaca, 843 F.2d 421,428 (10th Cir.) cert.denied, 488 U.S. 932,109 S.Ct.325,102 L.Ed.2d 342 (1988); United States v. Figueroa, 666 F.2d 1375,1379 (11th Cir.1982); United States v. Lawton, 995 F.2d 290,292 (D.C. Cir.1993). "Absent waiver, a constitutional verdict cannot be had on an unindicted offense." Floresca at 712.

I. COUNT SEVENTY IN THE INDICTMENT CHARGED A VERY SPECIFIC ALLEGEDLY FALSE STATEMENT.

The indictment states:

> COUNT SEVENTY
>
> On or about March 4, 1985, at Wheaton, in the Northern District of Illinois, Eastern Division, Richard E. Scott, defendant herein, knowingly and willfully did make and did cause to be made a false, fictitious and fraudulent statement and representation of material fact in a matter within the jurisdiction of the United States Securities and Exchange Commission, a department of the United States, in that defendant Richard E. Scott represented in a "Notice of Sales of Securities Pursuant to Regulation D or Section 4(6)" (SEC FORM D) that $601,020 of the proceeds of TGS-84 Limited Real Estate Partnership had been used for the purchase of real estate, whereas defendant Richard E. Scott then knew that such statement and representation was false; in violation of Title 18, United States Code, Section 1001. Appendix at 191.

A. The Very Specific Allegedly False Statement in the Indictment Was Placed Into Evidence at the Trial.

At trial the TGS-84 SEC FORM D described in the indictment was placed into evidence as prosecution exhibit number 70 (TR at 2883 line 10 to line 11). A copy of the exhibit is included in the Appendix at 192-200. Mr. Jonikas, the case agent employed by the government, testified during the trial about the content of the document and its meaning (TR 2964 line 2-TR 2972 line 14).

B. Three Similar Allegedly False Statements Were Placed Into Evidence at the Trial.

The prosecution also put in evidence (TR 2883 lines 10-11) SEC FORM D filings for Group 54 Partnership, Group 61 Partnership and Wheaton Oaks Partners (Appendix 201-226). The Scotts objected but were overruled (TR 2883 line 10-TR 2885 line 11).

The government's employee, case agent Mr. Jonikas, testified that each of these additional SEC FORM D's also allegedly contained a false statement of a material fact (TR 2973 line 22-TR 2975 line 4 and TR 2978 lines 11-24, as to Group 54), (TR 2979 line 5-TR 2981 line 9, as to Wheaton Oaks Partners) and (TR 2981 line 10-TR 2985 line 11, as to Group 61 Partnership).

C. Forty Other Allegedly False Statements Were Placed Into Evidence at the Trial.

At trial Mr. Mendeloff and Mr. Bunge, in addition to the four allegedly false statements in the four SEC FORM D's, presented 40 allegedly false statements in the Confidential Offering Memorandums (COM's). The COM's were writings involving matters under the jurisdiction of the SEC, a federal department.

II. THE JURY INSTRUCTION ON FALSE WRITING IS VERY BROAD.

The court charged the jury with 57 pages of instructions. A copy of the jury instructions is included in the Appendix at 47-104. Included among the jury instructions is one jury instruction that was presumably intended to cover Count Seventy (Appendix at 67). The jury instruction was read to the jury by the court (TR 4420 line 12 to 4421 line 2). The indictment is quite specific. The jury instruction, (Appendix at 67), which presumably applies to Count Seventy, is not. The word "presumably" is used purposefully to draw attention to the fact that the jury instruction is so broad that it not only covers Count Seventy but applies, as well, to all of the other sixty-nine counts.

The jury instruction states:

> To sustain the charge against defendant Richard E. Scott of making a false writing knowing it to contain any false statement, the government must prove the following propositions. First, the defendant made a false writing; Second, the

defendant knew the writing contained a false statement; Third, the statement was material; Fourth, the defendant made the writing knowingly and willfully; and Fifth, the writing was made in a matter within the jurisdiction of a federal department or agency. If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Appendix at 67.

A. The Jury Instruction on False Writing Lacks Particularity.

The jury instruction lacks particularity, and, thus, is far broader than the indictment when it describes the crime as "making a false writing knowing it to contain any false statement." (Emphasis supplied). The indictment identifies a specific allegedly false writing and a specific allegedly false statement.

At trial six COM's and four SEC FORM D's were presented. All ten documents were writings involving matters under the jurisdiction of the SEC. All ten alleged false writings contained alleged false statements.

B. The Jury Instruction on False Writing Covers All Forty-Four Allegedly False Statements That Were Placed Into Evidence at the Trial.

The COM's of the five partnerships and the letter of credit transaction are writings concerning matters under the jurisdiction of the Securities and Exchange Commission, a federal department. Mr. Mendeloff and Mr. Bunge presented evidence alleging that Mr. Richard E. Scott and Mr. Douglas W. Scott made dozens of false statements in those writings. The cover pages of the COM's and the letter of credit transaction make prominent reference to the Securities and Exchange Commission (Appendix at 23-33).

C. The Jury Instruction on False Writing Covers More Than Count Seventy.

The jury instruction on false writing does not state that it pertains to Count Seventy only. Yet, all jury instructions given by the court in this case which were limited to only one specific count identified specifically which one of the seventy counts in the indictment the instruction was applicable to. Appendix at 47-104 contains all 57 jury instructions. The Appendix at 53, 56, 57, 58, 59, 60, 61, 64, and 66 are jury instructions which mention the specific count or counts to which they apply. None of the other 48 pages of jury instructions mention specific counts. Since a particular count was not specified by the false writing jury instruction, the jury could reasonably conclude the jury instruction affected all the counts.

The jury instruction on false writing does not restrict itself to Count Seventy. The language of the instruction covers all the counts in the indictment. The false writing jury instruction states that, "If you find from your consideration of all the evidence that each of the propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty." (emphasis supplied), (Appendix at 67). The instruction on false writing does not state that the jury should find the defendant "guilty of Count Seventy." The jury instruction on false writing specifically covers all the evidence. The phrase "all the evidence" must cover all the alleged false statements and all the counts. The false writing jury instruction allows the possibility of the jury finding Mr. Richard E. Scott guilty on all the counts.

III. TWO BASES FOR A CONSTRUCTIVE AMENDMENT.

"A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the Court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." United States v. Floresca, 38 F.3d 706, 710 (4th Cir.1994). In this case, both occurred.

A. The Prosecution Caused a Constructive Amendment By Trial Evidence.

Mr. Mendeloff and Mr. Bunge presented as evidence the allegedly false statements in three SEC FORM D's not charged in the indictment (Group 54 Partnership's, Wheaton Oaks Partners', and Group 61 Partnership's SEC FORM D's).

B. The False Writing Jury Instruction Caused a Constructive Amendment.

The false writing jury instruction given by the district court contained numerous errors. The instruction included the following errors. 1) The instruction was overly broad in that it applied to all 44 allegedly false statements identified in the Scotts' appellate brief. The instruction should have addressed only the very specific allegedly false statement found in Count Seventy of the indictment. 2) The instruction was overly broad in that it did not specify that it only concerned Count Seventy. All the other instructions, among the 57 instructions given, which concerned only a very specific count, identified precisely the very specific count. 3) The instruction was overly broad in that it compelled the jury by the language of the instruction to find Mr. Richard E. Scott guilty, not just of Count Seventy, but guilty, period, without specifying any specific count(s). 4) the instruction was overly broad in that it enlarged the bases of conviction for Mr. Richard E. Scott. The bases contained in the indictment alleged only one very specific false statement in a matter involving the SEC, mail fraud, RICO, and RICO conspiracy. The bases contained in the instruction allowed a finding of guilt, period, apparently affecting all the counts, if the jury concluded that any one or more of the 44 allegedly false statements in matters involving the SEC presented at the trial by the government met the list of general propositions in the instruction. 5) The instruction was overly broad in that it compelled conviction if the jury concluded that any one or more of the 44 allegedly false statements in matters involving the SEC presented at the trial by the government met the list of general propositions in the instruction without requiring unanimity of the jurors to any specific allegedly false statement or to any combination of one or more of the 44 allegedly false statements. 6) The instruction was in error in that it led to the broadening of the bases of conviction for Mr. Douglas W. Scott under the requirements of the conspirator jury instruction.

C. The Errors in the False Writing Jury Instruction Were Plain.

The errors in the false writing jury instruction given by the district court were plain.

D. The Errors in the False Writing Jury Instruction Affect the Substantial Rights of the Scotts.

The errors in the false writing jury instruction given by the district court did affect the substantial rights of the Scotts under the Fifth and Sixth Amendments to an indictment by a grand jury and to be definitely informed of the charges against them Russell v. United States, 369 U.S. 749, 8 L.Ed.2d 240, 249.

E. The Jury Verdict Was Affected by the District Court's Overly Broad False Writing Jury Instruction.

The government never adequately explained the alleged scheme to defraud to the jury. Instead, the government focused the attention of the jury on a series of alleged frauds and on the 44 allegedly false statements. The government did not dispute this in their appellate brief. The redacted indictment presented to the jury would have confused the jury because it improperly included the bankruptcy paragraph which had been previously stricken and never proved at trial. A jury confused by the redacted indictment supports an inference that the jury relied on the false writing jury instruction instead of the mail fraud jury instruction because the false writing jury instruction fit the evidence at trial.

In the case here, the indictment was never read to the jury. The district court never discussed details of the indictment with the jury in this case, as the district court did in U.S. v. Machi, 811 F.2d 991,1005 (7th Cir. 1987).

The jury never saw a copy of the real indictment. It was not until the jury began to deliberate that an incorrect copy of the indictment became available to the jury. The copy of the indictment given to the jury (Appendix 105-191) was improperly redacted by the government. The improperly redacted indictment given to the jury still contained paragraph 12, the bankruptcy aspect of the alleged bankruptcy scheme to defraud which had been improperly stricken from the indictment before the trial began by the prosecutors and the court (see Question 3).

The jury could not have read the alleged scheme to defraud as described in the improperly redacted indictment and convicted the Scotts on the mail fraud counts. It would have been apparent to the jury that the government had not proven the bankruptcy aspect of the alleged scheme incorporated in each of those counts.

The instructions are to be considered as a whole. The district court specifically instructed the jury to consider each defendant and each count separately. Considering the instructions as a whole and each defendant and each count separately does not [M]ean that an instruction by itself may never rise to the level of a constitutional error, it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction. U.S. v. Machi at 995 (emphasis supplied).

Since the government never adequately explained the alleged scheme to the jury, the jury more likely reacted to the government's focus at trial on the alleged false statement evidence and the false testimony of Mr. Jonikas, (see Question 2). Mr. Mendeloff, in the rebuttal portion of the government's closing argument, focused the jury's attention on the alleged false statements.

F. The Errors in the False Writing Jury Instruction Did Seriously Affect the Fairness, Integrity and Public Reputation of Judicial Proceedings.

The convictions of the Scotts on bases not included in the indictment presented by the grand jury seriously affect the fairness, integrity and public reputation of judicial proceedings. All citizens have a right, protected by the Fifth Amendment, to an indictment of the grand jury. All citizens have a right, protected by the Sixth Amendment, to an indictment which definitely sets forth the charges against them.

IV. A CONSTRUCTIVE AMENDMENT AFFECTS DEFENDANTS' SUBSTANTIAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

A constructive amendment affects the Scotts' substantial rights under the Fifth and Sixth Amendments to an indictment by a grand jury and to be definitely informed of the charges against them (Russell v. United States, 8 L.Ed.2d at 249).

V. THE SCOTTS PRESERVED THEIR RIGHTS TO A REVIEW BY THE COURT OF THIS ISSUE.

The Scotts did not waive their claim to review of the false writing jury instruction. The government argues the Scotts waived their right to even a plain error review on the broad false writing jury instruction since the Scotts "[E]xpressly did not object to Instruction 31." To support their position the government cites U.S. v. Lakich, 23 F.3d 1203, 1207 (7th Cir.1994). However, Lakich is not on point. The facts in Lakich are different than the facts in this case. Lakich's counsel "explicitly agreed" to a supplemental jury instruction, and, thereby, intentionally waived his right to review of the supplemental jury instruction on appeal.

In this case neither Mr. Halprin nor Mr. Graham, appointed counsel who represented Mr. Richard E. Scott and Mr. Douglas W. Scott respectively, "explicitly agreed" to the false writing jury instruction. Mr. Graham stated during the jury instruction conference on January 26, 1995, "There is no objection to 31." (TR at 4174 line 15). Mr. Halprin was silent on 31.

The Scotts' counsel did not "explicitly agree" to the jury instruction. Therefore, they did not intentionally relinquish or abandon a known right. The Scotts did not waive their rights to a plain error review U.S. v. Lakich 1203,1207 (7th Cir.1994). The Scotts counsels' actions did forfeit a right to a review standard other than the review standard allowed under the plain error rule U.S. v. Starnes, 14 F.3d 1207,1213 (7th Cir.1994); U.S. v. Lampkins, 47 F.3d 175,177-78 (7th Cir.1995); U.S. v. Sherwood, 770 F.2d 650,652-53 (7th Cir.1985).

VI. A CONSTRUCTIVE AMENDMENT, NOT A VARIANCE, OCCURRED.

The overly broad false writing jury instruction combined with the evidence presented at trial and the emphasis made by the prosecutors in their remarks during closing arguments did not create a variance. "A variance occurs when the trial evidence narrowed the indictment's charges without adding any new

offenses." United States v. Thompson, 23 F.3d 1225,1230 (7th Cir.1991). In the case here, the evidence presented at trial of 44 allegedly false statements, and the overly broad false writing jury instruction combined to broaden the bases of conviction beyond those presented in the indictment of the grand jury.

VII. BOTH MR. RICHARD E. SCOTT AND MR. DOUGLAS W. SCOTT WERE PREJUDICED.

The constructive amendment described above requires reversal for both Scotts on all counts. Though the false writing jury instruction is specific to Mr. Richard E. Scott, it is broad enough to allow the instruction to be the basis on which Mr. Richard E. Scott was convicted on each count. No one can say with certainty that the jury did not convict Mr. Richard E. Scott on the basis set forth in the false writing instruction. Finding Mr. Richard E. Scott guilty on the false writing instruction, which affects all the counts, taints the conviction of Mr. Douglas W. Scott, the other defendant, on all counts as well.

Under the racketeering conspiracy and racketeering convictions in Counts 1 and 2, the jury necessarily found a conspiracy existed between Mr. Richard E. Scott and Mr. Douglas W. Scott. The jury instruction given by the Court on a conspirator required the jury to find Mr. Douglas W. Scott guilty on every count the jury found that Mr. Richard E. Scott was guilty.

The conspirator jury instruction states:

> A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of or as a material consequence of the conspiracy.
>
> Therefore, if you find a defendant guilty of the conspiracy charged in Count One and if you find beyond a reasonable doubt that while he was a member of a conspiracy, his fellow conspirator committed the offenses charged in Counts Two through Sixty-nine in furtherance of or was a natural consequence of that conspiracy, then you should find the defendant guilty of those counts. Appendix at 56.

If the conspirator jury instruction was not strong enough by itself, Mr. Mendeloff made sure the jury understood the conspirator jury instruction's requirement in his closing argument. Mr. Mendeloff emphasized in his closing argument the necessity of the jury finding Mr. Douglas W. Scott guilty on every count the jury found Mr. Richard E. Scott guilty. He stated, "And one thing you're going to be told in the instructions in this case is that a co-conspirator is responsible for offenses committed by his fellow co-conspirator if he was a member of the conspiracy when the offense was committed in furtherance of the conspiracy; in other words, even though Douglas W. Scott doesn't do some of the things that Richard E. Scott does, he's responsible for what Richard E. Scott is doing if they're members of the conspiracy at the same time." (TR 4396 line 24-TR 4397 line 7)(emphasis supplied).

The jury instructions leave no doubt what the jury must do. The court instructed the jury, "You must not question any rule of law stated by me in these instructions." (TR 4402 lines 23-25).

VIII. CONCLUSION ON QUESTION 1.

A constructive amendment, not a variance, occurred by means of the false writing jury instruction. The false writing jury instruction was overly broad and allowed the very real possibility that Mr. Richard E. Scott was convicted on bases not presented in the indictment of the grand jury. Mr. Richard E. Scott could have been convicted on the bases of any one of the three additional SEC Form D's presented at trial. Furthermore, because the false writing instruction was overly broad it allowed the very real possibility that Mr. Richard E. Scott was convicted of a less specific offense than that presented in the indictment of the grand jury (any one of 44 allegedly false statements rather than the mail fraud scheme). Because of the conspirator jury instruction, the false writing jury instruction and the three additional SEC Form D's presented at trial but not included in the indictment improperly affected the jury's verdict of Mr. Douglas W. Scott. For the reasons stated herein the convictions of both defendants need to be corrected and reversed.

QUESTION 2 PROSECUTORIAL MISCONDUCT

Were the Scotts deprived of their liberty without due process of law as required by the Fifth and Fourteenth Amendments to the Constitution of the United States by the prosecutors' failure

to notify the Scotts, as required by Fed.R.Crim.Proc.(16)(a)(1)(E), of their intended use of Mr. Jonikas as an expert witness and by the prosecutors' knowing use of Mr. Jonikas to present false testimony?

The United States Court of Appeals for the Seventh Circuit has sanctioned a departure so far from the accepted and usual course of judicial proceedings by the district court as to call for an exercise of this Court's supervisory powers. It was improper for the district court to allow the government to ambush the Scotts at trial by skirting their responsibility to comply with the notice requirements for expert witnesses required by Fed.R.Crim.Proc. 16(a)(1)(E and to allow the government to knowingly present the false testimony of Mr. Jonikas. As a consequence, the Scotts' convictions are a manifest injustice which must be corrected.

I. THE GOVERNMENT FAILED TO NOTIFY THE SCOTTS ABOUT THEIR INTENDED USE OF MR. JONIKAS AS AN EXPERT WITNESS, VIOLATING FED.R.CRIM.PROC.16(a)(1)(E) AND THE COURT FAILED TO PROTECT THE SCOTTS.

The government, despite the Scotts' request in a pretrial motion, failed to meet the mandatory requirements of Fed.R.Crim.Proc.16(a)(1)(E). First, the government failed to give notice to the Scotts of their intended use of Mr. Jonikas as an expert witness. Second, the government failed to give notice to the Scotts of Mr. Jonikas' qualifications (at trial the testimony of Mr. Jonikas' qualifications covers 14 transcript pages (TR 364 line 1-TR 378 line 6)). Third, the government failed to notify the Scotts that Mr. Jonikas was going to use controversial techniques to obtain his opinions. Fourth, the government failed to provide the Scotts with a summary of Mr. Jonikas' expected testimony. Fifth, the government failed to notify the Scotts that Mr. Jonikas would offer opinions (at trial, Mr. Jonikas, among many other opinions, offered more than 100 opinions about the allegedly improper use of checks by the Scotts for purposes unrelated to the partnerships. Mr. Jonikas expressed opinions on legal terms such as "fraud," "lulling," and "pyramid scheme"). Sixth, the government failed to provide a written summary to the Scotts of the opinions Mr. Jonikas presented at trial.

The Scotts were ambushed at trial. The Scotts were denied pretrial preparation because of the government's failure to meet the mandatory notice requirements. The Scotts' counsels were not experts in accounting. Without the proper notice, the Scotts' counsels did not have an opportunity to consult with accounting experts to determine whether Mr. Jonikas' opinions were valid. The Scotts' counsels did not have the opportunity to secure expert accounting witnesses to challenge Mr. Jonikas' opinions.

At trial, the Scotts' counsels did not at first recognize that Mr. Jonikas was giving opinions derived by ignoring "second entries" in the general ledgers, and, therefore, did not initially object. The Scotts' counsels did begin to object when they recognized Mr. Jonikas was improperly offering opinions (TR 596 line 8-597 line 15; TR 652 line 21-653 line 18; TR 735 line 11-738 line 1; TR 758 line 24-760 line 3; TR 760 lines 24-25; TR 761 line 22-762 line 2; TR 762 line 14-762 line 18; TR 763 line 15. The court denied each objection. Each time that the court gave a reason for its denial, the court stated that Mr. Jonikas could express opinions as an expert under Rule 702. The eighth time the Scotts' counsels objected to an opinion given by Mr. Jonikas (TR 765 line 3-768 line 6), they specifically stated that the government had failed to provide the required notice. "Mr. Graham: `We'd also object to the fact that this witness was never tendered to us as an expert. We have no notice of this, Judge.'" (TR 766 lines 21-23). The court, then, expressly recognized Mr. Jonikas as an expert witness (TR 767 lines 4-7), and asked Mr. Mendeloff, "You did tell, I assume, the defendants that you were going to call this witness somewhere along the way." (TR 767 lines 8-9). Mr. Mendeloff replied that the Scotts had been given copies of charts and told that Mr. Jonikas would be used as a summary witness. Mr. Mendeloff said:

> Mr. Mendeloff: Judge, here is what we did. We told them -- before the case started we gave them the charts and we told them a long time before the case started how we intended to try the case. That within two or three weeks --
>
> Mr. Graham: Not in terms of opinions of this witness.
>
> Mr. Mendeloff: We told them that we intended to call him to put in all of these charts. And the stipulations were

needed to be put in as foundation so that he could put in the summary evidence early on in the case. And that was disclosed.
TR 767 lines 10-18

Mr. Mendeloff did not tell the court that he had met the mandatory requirements of Fed.Rule of Cr. Proc.16(a)(1)(E) because he had not. The court abused its discretion and committed clear error affecting the Scotts' substantial rights to due process when it did not strike Mr. Jonikas' testimony in its entirety and permitted Mr. Jonikas to continue testifying (TR 767 line 25-768 line 6). In total, Mr. Jonikas testified three different times on seven different days.

The government argues it "[N]ever offered Jonikas as an expert, and he was never presented to the jury as such." (Govt's Appellate Br. at 37). The government apparently means that it did not say the words, "We offer Mr. Jonikas as an expert witness." It is true. They did not say those words. But, in this case, the failure to do so supports an inference of a government strategy to abuse the process.

The government argues that only Mr. Douglas W. Scott qualifies for an abuse of discretion review standard on this issue and that a plain error review standard is required for Mr. Richard E. Scott. However, both Scotts' counsels were involved in the series of objections leading up to the court's decision not to strike Mr. Jonikas' testimony. The Scotts believe both Scotts are entitled to an abuse of discretion review. In case the Court disagrees, the Scotts provide the following plain error argument.

The district court erred when it did not strike Mr. Jonikas' testimony. The government's failure to comply with the mandatory notice requirements of Fed.R.Crim.Proc.16(a)(1)(E) prejudiced the Scotts and denied the Scotts a fair trial. What occurred in this case is the type of abuse the rule is designed to prevent.

The error was plain. The Scotts' substantial rights to due process under the Fifth and Fourteenth Amendments were denied by the government's failure to make the mandatory notification under Fed.R.Crim.Proc.16(a)(1)(E). The government's conduct violated fundamental fairness.

Absent Mr. Jonikas' testimony, which was tied by the government to virtually every witness, the Scotts would not have

been convicted. With proper notice the Scotts could have employed an expert to expose Mr. Jonikas' improper testimony, and the Scotts would not have been convicted. The government's and the court's improper actions seriously affected fairness, integrity and the public reputation of public proceedings. These errors must be corrected. Mr. Jonikas' testimony must be stricken. The convictions of the Scotts must be reversed.

II. MR. MENDELOFF, MR. BUNGE AND MR. JONIKAS CONSPIRED TO PRESENT FALSE TESTIMONY.

Mr. Mendeloff, Mr. Bunge and Mr. Jonikas conspired with each other and others unknown to present false testimony.

A. Mr. Jonikas, a Government Employee and Case Agent in This Case, Testified Under Oath at the Trial as Mr. Mendeloff's and Mr. Bunge's Main Witness.

Mr. Mendeloff called Mr. Jonikas, the case agent in this case, as the third prosecution witness at the trial. Mr. Jonikas was the major witness for the prosecution. Mr. Jonikas testified three different times on seven different days. Mr. Jonikas' direct testimony is covered in 667 pages of the transcript (TR 363 line 21-TR 977 line 13; TR 2956 line 23-TR 3005 line 7; TR 4134 line 18-TR 4138 line 17).

1. Mr. Jonikas testified that he was a trained accountant and an employee of the U.S. Attorney's office.

Mr. Jonikas testified he was a Certified Public Accountant (TR 364 line 19) employed by the U.S. Attorney's office (TR 364 lines 23-24). Mr. Jonikas testified that his responsibilities with the U.S. Attorney's office were to provide accounting analysis for bank fraud and financial fraud cases (TR 365 lines 2-5).

2. Mr. Jonikas, with the complicity of Mr. Mendeloff and Mr. Bunge, presented false testimony about how partnership monies were spent because he intentionally ignored certain "second entries" found in the general ledgers of the partnerships.

The Scott entities maintained meticulous business, financial and accounting records (TR 245 line 1-TR 247 line 3). The Scott

entities employed seven full time Certified Public Accountants who were supported by a complete accounting staff (TR 3925 lines 2-14; TR 214 line 1-TR 217 line 22). The accounting system utilized by the Scott entities was computerized (TR 3116 line 16). The significance of a computerized accounting system is that the computer required that every entry of data into the accounting record had to be matched with a "second entry" or the computer would not accept the first entry (TR 3116 lines 21-23).

Each Scott entity kept general ledgers, check registers, cancelled checks, bank reconciliations, bills payable files, property files, insurance files, property management files, partnership management files, tax returns, and workpapers (TR 3118 lines 5-12).

A check register is a record of the money coming into and going out of the entity. Each deposit or check recorded in a check register of an entity is also recorded in the general ledger of the entity as the first entry. The first entry in the general ledger must be balanced with a second entry in the general ledger or the computer will not accept the first entry. Each first entry of a debit or credit must be balanced by a second entry of a credit or debit. The two entries fit together like hand and glove. In the words of Mr. Jonikas this double entry is an "every time" occurrence. "[E]very time there's one entry made, there's always a corresponding second entry made." (TR 374 lines 3-5).

The general ledger accumulates first and second entries not just from the check registers but from virtually all of the various financial, property, partnership, management, and partner records kept by an entity. Many of these other financial records are first summarized by an accounting staff on ledger sheets and collected into a file folder, collectively referred to as workpapers. The data from the workpapers is then entered into the general ledger. Every time a first entry is made into the computerized general ledger from the financial data in the workpapers (just like with the check registers), a corresponding second entry must be entered into the computerized general ledger or the first entry will be rejected. The requirement of a "second entry" for every "first entry" is why, in Mr. Jonikas' words, "[W]e call it double entry bookkeeping or double entry accounting." (TR 374 lines 5-6).

When a general ledger is printed out by the computer, every first entry and every second entry is printed out. The general ledgers for each of the partnerships at issue in this case were included in the 30 file boxes of financial records turned over to the government by the Scotts. Mr. Jonikas testified he had reviewed many records including the general ledgers contained in those 30 file boxes (TR 370 line 4-TR 372 lines 2-11).

The "second entry" does more than just balance off the "first entry." The "second entry" helps to explain what the "first entry" means. The "second entry" categorizes the flow of the money. Mr. Jonikas acknowledged that in his testimony (TR 374 lines 9-11). He further agreed that the categorization of the flow of money by the corresponding second entries into the accounting system is one of the functions that accountants perform (TR 374 lines 9-13).

It was disturbing, therefore, to hear Mr. Jonikas testify that he had chosen to focus his analysis on the checks issued by the partnerships, not on the general ledgers which contain the explanations of the first entries (in the form of the second entries), but on the check registers alone which contain only the "first entries." Mr. Jonikas answered "correct" when Mr. Mendeloff asked him, "[Y]ou said you focused your analysis of how the investors' money was used and how it came in, not on the general ledger, but on the check registers themselves" (TR 374 lines 17-20). This choice by the prosecution to ignore certain of the "second entries" in the general ledgers was a fraudulent tactic and was fundamentally unfair to the Scotts because it is the "second entries" that showed the intent of the Scotts. No one could fairly analyze how the "investors' money" was used without utilizing the information in the "second entries" in the general ledger.

Based on this fraudulent tactic the prosecution, using the information from the check registers alone, developed their own "categorization of the flow of money" to satisfy their theory of the offense, that the Scotts spent the "investors' money" for purposes unrelated to the partnerships. This fraudulent tactic was the basis for the false testimony under oath by Mr. Jonikas. This fraudulent tactic was prevaricated by Mr. Mendeloff, Mr. Bunge and Mr. Jonikas.

B. Mr. Mendeloff, Mr. Bunge, and Mr. Jonikas Presented Fraudulent Tactics at Trial.

1. Messrs. Mendeloff's, Bunge's and Jonikas' fraudulent tactic number one: The prosecution chose to selectively ignore certain "second entries" in the Scotts' accounting records and presented only that part of the accounting records that fit their theory.

This tactic was fraudulent because the accounting records were both accurate and complete, yet, the prosecution unfairly and dishonestly selected only the facts that fit their theory.

This is not a case where books and records did not exist (TR 1014 lines 9-TR 1015 line 18) and a reconstruction of how the partnerships spent their money was necessary. Mr. Jonikas testified that his decision to focus on check registers and selectively ignore certain "second entries" in the general ledgers was justified because it "[A]llowed me to determine who invested money and how that money was subsequently used." (TR 375 lines 15-16). It was not possible for Mr. Jonikas to accurately determine how the money was subsequently used without utilizing all the accounting information available.

Messrs Mendeloff, Bunge and Jonikas knowingly selected a fraudulent methodology on which to base their case, and, as a result, Mr. Jonikas presented false, fraudulent and misleading information under oath. Mr. Mendeloff and Mr. Bunge violated their duty as attorneys and as government representatives.

Mr. Mendeloff, Mr. Bunge and Mr. Jonikas apparently felt they had to present false testimony to win the convictions. But, winning convictions at the expense of fairness is not proper. "The proper role of a criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction. Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1196; Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir.1991).

2. Messrs. Mendeloff's, Bunge's and Jonikas' fraudulent tactic number two: The prosecution misled the jury by repeatedly saying that most of the partnerships'

money was used for purposes unrelated to the partnerships.

At trial Mr. Mendeloff, Mr. Bunge and Mr. Jonikas based most of their case against the Scotts on the false testimony by Mr. Jonikas that each partnership entity spent most of the money it subscribed for uses allegedly "unrelated" to the partnership. (Mortgage Fund VII, TR 406 line 1-TR 424 line 25; Group 54 Partnership, TR 532 line 14-TR 582 line 25; Group 61 Partnership, TR 707 line 23-TR 741 line 19; Wheaton Oaks Partners, TR 825 line 5-TR 843 line 5; and TGS-84 Partnership, TR 925 line 9-TR 947 line 9). Dozens of charts were prepared by Mr. Jonikas and placed into Jury Book 3 (one of three jury books prepared by Messrs Mendeloff, Bunge and Jonikas and given to the jury during the trial). Contained among the 81 charts in Jury Book 3 were charts referred to as "Cash Flow Chart A's." The "Cash Flow Chart A's" contained a heading which read "unrelated" uses. Copies of these "Cash Flow Chart A's" are included in the Appendix at 17-22. The "Cash Flow Chart A's" present false information.

The prosecution was only able to categorize the use of a partnership's monies as "unrelated" to the partnership by systematically ignoring the "second entries" entered in the partnership's general ledger. The prosecution intentionally ignored those second entries because they clearly documented that a partnership's monies were only spent as authorized by the Limited Partnership Agreement of the partnership. If the prosecution had presented the accounting information completely and fairly, they could not have won a conviction. The Scotts can only conclude that that is why they chose their fraudulent approach. To emphasize this false testimony Messrs. Mendeloff, Bunge and Jonikas enlarged the "Cash Flow Chart A's" and put them on easels near the jury box. The prosecution, during its direct examinations, tied most of the investor witnesses to the false conclusions contained in the prosecution's charts. Repeatedly, when questioning an investor witness, the prosecution would show the witness the "Cash Flow Chart A," and, then, would ask the witness if he knew that the partnership had spent its money on purposes unrelated to the partnership? The answer was always "no." This question was then followed by another question, asking the investor that if he had

known that the partnership's money would be spent on purposes unrelated to the partnership, would it have made a difference to him? The answer was always "yes" (TR 1125 line 12-TR 1128 line 6; TR 1270 line 9-TR 1272 line 3; TR 1386 line 7-TR 1387 line 18; TR 1431 line 18-TR 1433 line 14). What the witness did not know was that both Mr. Jonikas' charts and his analysis were fraudulent.

Between Mr. Jonikas' testimony and the testimony of five other prosecution witnesses (Klong, Bos, Erdman, Adams and Neubert), there are one hundred citations where the false idea of "unrelated use of partnership money" was heard by the jury. The list of those one hundred citations is included in the Appendix at 34. The Scotts stopped tabulating the list of citations at the one hundred mark because the list seemed long enough to make the point. Dozens more could have been listed. The false testimony by Mr. Jonikas about "unrelated" expenditures permeated the trial and had to adversely affect the jury's view of the Scotts.

The prosecution's reconstruction of how the partnerships spent their money consisted of tracing the checks written by the partnership against the money received by the partnership to determine, according to Mr. Jonikas, the "[U]ltimate use of that money...." (TR 401 line 15). Mr. Jonikas described his methodology in tracing money (TR 400 line 1-TR 401 line 20). Mr. Jonikas testified he looked at the check register for deposits and checks (TR 400 lines 3-6). At no point in the description of his methodology in tracing checks does Mr. Jonikas mention looking at the "second entries" recorded in the general ledger. Mr. Jonikas just followed the checks (TR 400 line 7). If the check paid an expense, Mr. Jonikas stopped his trace (TR 400 lines 7-10). If the check was written to another Scott entity, Mr. Jonikas did not stop his trace (TR 400 line 13-TR 401 line 2). Mr. Jonikas did not testify during the recitation of his tracing methodology that he ever bothered, after having traced a check to a second Scott entity, to see how the transaction was recorded in the general ledger of that second Scott entity. Mr. Jonikas' goal was to find the "[U]ltimate use of the investor money...." (TR 401 line 15). Mr. Jonikas, utilizing his fraudulent tracing procedure, is now in the books and records of a second Scott entity different from the partnership where the money originated (TR 401 lines 8-11). Mr. Jonikas

testified that he only looked at the check register, checks and deposits in that second entity (TR 401 lines 12-15). It is clear from Mr. Jonikas' testimony that Mr. Jonikas ignored how the transaction was recorded in the general ledger of that second entity. Mr. Jonikas has now selectively ignored certain "second entries" in two sets of general ledger entries, the general ledger of the original partnership and the general ledger of a second Scott-related entity. Mr. Jonikas testified if the check did not seem to be for a bill that he would trace the money from the second Scott-related entity still further to other entities (TR 401 lines 16-18).

Mr Jonikas' tracing methodology always relied on the check registers, checks and deposits and ignored the other accounting records, a very fraudulent analysis for a Certified Public Accountant. Mr. Jonikas testified that he continued with his tracing until he found where "[A] check was actually written that left the company and was used to pay some kind of bill" (TR 401 lines 19-20). At this point in his fraudulent tracing methodology testimony, the "company" Mr. Jonikas was referring to is not the original partnership but another Scott-related entity, one or two or even more transactions away from the original partnership. As in the original partnership, Mr. Jonikas ignores in the subsequent entities the intent of the Scotts because he selectively ignores certain "second entries" in the general ledgers.

Mr. Jonikas' fraud began with an intentional decision to selectively ignore certain general ledger entries (particularly the "second entries") in the original partnership books and records. By his methodology Mr. Jonikas multiplied the effect of his initial fraud by utilizing the same fraudulent tactic one or two or even more times as he pursued his trace. Not surprisingly, Mr. Jonikas concludes falsely and improperly that the "ultimate" use of a check was for a purpose unrelated to the original partnership.

Mr. Jonikas testified he used the same fraudulent tracing methodology for each of the partnerships at issue in this case (Mortgage Fund VII, TR 400 line 1-TR 401 line 20; Group 54 Partnership, TR 538 line 6-TR 541 line 3; Group 61 Partnership, TR 706 line 25-TR 707 line 22; Wheaton Oaks Partners, TR 806 line 14-TR 806 line 22; and TGS-84 Partnership, TR 909 lines 10-14).

In each entity Mr. Jonikas concluded unfairly that most of the "ultimate" uses of the money raised were "unrelated to the partnerships." Mr. Jonikas' conclusions were false because he intentionally chose a fraudulent tracing methodology.

3. Conclusions regarding the prosecution's knowing use of Mr. Jonikas' false testimony.

Messrs. Mendeloff, Bunge and Jonikas violated the substantial rights of the Scotts by presenting false evidence to the jury by means of these six fraudulent tactics. "It is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State must fall under the Fourteenth Amendment...the principle that a State may not knowingly use false evidence including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty...." Napue v. Illinois 360 U.S. at 269, 79 S.Ct at 1177 (citations omitted). Brown v. Borg 951 F.2d 1011, 1015 (9th Cir.1991).

The presentation of false, fraudulent and misleading testimony shifted the burden of proof, which rests with the prosecution by law, to the Scotts. The Scotts were put in the position of having to prove that the prosecution's witnesses committed perjury, a burden not intended for defendants.

"A prosecutor's presentation of tainted evidence is viewed seriously and its effects are exceedingly carefully scrutinized." United States v. Polizzi, 801 F.2d 1543, 1550 (9th Cir.1986): A new trial is required, "If there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." Id., 951 F.2d 1011, 1015 (9th Cir.1991).

A lesser standard of review in a direct appeal of a criminal conviction may be applicable in this case. "[F]alse testimony need not rise to the level of a constitutional violation in order to be a ground for a new trial." United States v. Catton, 89 F.3d 387,388 (7th Cir.1996).

III. CONCLUSION ON QUESTION 2.

Mr. Mendeloff and Mr. Bunge did not obtain fair convictions because of their misconduct in this case. They chose not to give the required notice under Fed.R.Crim.Proc.(16)(a)(1)E) of their intention to use Mr. Jonikas as an expert witness. They knowingly presented the false testimony of Mr. Jonikas. They

presented the false testimony with enormous force by the use of more than 81 charts. They used the false conclusions of the false testimony of Mr. Jonikas hundreds of times at trial. They tied virtually every live witness to the false testimony of Mr. Jonikas. They referred to Mr. Jonikas' false testimony many times in their closing arguments. The false testimony of Mr. Jonikas permeated the trial. "The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence. E.G. Miller v. Pate, 386 U.S. at 6, 87 S. Ct. at 787..." Brown v. Borg, 951 F.2d. 1011, 1017 (9th Cir. 1991). The Scotts would not have been convicted absent the prosecutors' misconduct. The false testimony of the prosecution's main witness, Mr. Jonikas, colored the trial black. The Scotts respectfully request that this Court exercise its supervisory powers and reverse their convictions on all counts because the government's misconduct in this case affected their rights to due process under the Fifth and Fourteenth Amendments.

QUESTION 3 ACTUAL AMENDMENT

Were the substantial rights of the Scotts under the Fifth and Sixth Amendments to the Constitution violated when the district court, prior to the trial, granted the prosecutors' motion to physically amend the indictment without resubmission of the indictment to the grand jury? The amendment struck the bankruptcy aspect of the indictment which was the heart of the alleged bankruptcy scheme to defraud. Defenses available to the Scotts under the indictment as it originally stood were no longer available to the Scotts after the amendment was made.

The Court of Appeals for the Seventh Circuit has entered a decision in conflict with the decisions of other United States Courts of Appeals on the same important issue.

The Scotts were prejudiced because of the elimination of their bankruptcy defenses. "The test as to whether a defendant is prejudiced by an amendment to an indictment has been said to be whether a defense under an indictment as it originally stood would be available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in one form or the other." United States v. Denny, 165 F.2d 668,670 (7th Cir. 1947) cert. denied, 333 U.S. 844,92

L.Ed 1127,68 S.Ct. 662 (1948). See U.S. v. Bledsoe, 898 F.2d 430,432 (4th Cir. 1992); United States v. Mason, 869 F.2d 414,417 (8th Cir. 1989); United States v. Cook, 745 F.2d 1311,1316 (10th Cir. 1984); United States v. Kegler, 724 F.2d 190,195 (D.C. Cir. 1984).

Before the trial began, before the jury was selected, before any evidence was presented to the trial jury and without prior notice to the Scotts, the prosecutor moved to strike the bankruptcy aspect of the alleged bankruptcy scheme to defraud charged in the indictment (Appendix at 40-46; specifically, Appendix at 44 line 5-45 line 5). The court, at prosecutors' urging, over the Scotts' objections and to the Scotts' surprise granted the motion without giving any reason.

The decision by the district court to grant the prosecutors' motion to strike the bankruptcy paragraph resulted in an actual, physical amendment of the indictment without resubmission of the indictment to the grand jury.

The Scotts had focused for two and one-half years on defenses related to the bankruptcy aspect of the indictment. The Scotts were severely prejudiced when the defenses allowed by the bankruptcy aspect were eliminated. Douglas W. Scott adopts the arguments made on this issue by his codefendant in: Richard E. Scott v. United States of America

CONCLUSION

For the violations of their substantial rights under the Constitution of the United States, the frequency and severity of the errors which infected this case, and the fundamentally unfair convictions, the Scotts respectfully request that this Court grant this petition for certiorari, reverse their convictions on all counts or grant such other relief as it may deem just and equitable.

Respectfully submitted,

Douglas W Scott

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WHEATON, IL 60187
1-630-668-2997

APPENDICES

Douglas W. Scott adopts the short appendix and the appendix included in his codefendant's filing: Richard E. Scott v. United States of America.

(2) Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Docket No._____

SUPREME COURT OF THE UNITED STATES
OCTOBER 1997 TERM

DOUGLAS W. SCOTT,	)	
	)	
Petitioner,	)	ON PETITION FOR WRIT
	)	OF CERTIORARI TO THE
v.	)	UNITED STATES COURT
	)	OF APPEALS FOR THE
UNITED STATES OF AMERICA,	)	SEVENTH CIRCUIT
	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

APPENDIX

DOUGLAS W. SCOTT
1465D WOODCUTTER LANE
WHEATON, IL 60187
1-630-668-2997

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 18, 1997*

Decided March 19, 1997

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 95-2078 and 95-2097	v.	Nos. 92 CR 226
DOUGLAS W. SCOTT and RICHARD E. SCOTT, *Defendants-Appellants.*		Charles R. Norgle, Sr., *Judge.*

ORDER

Richard E. Scott was convicted of racketeering and racketeering conspiracy in violation of 18 U.S.C. § 1962(c) and (d), 44 counts of mail fraud in violation of 18 U.S.C. § 1341, and

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the records. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

making a false statement and misrepresentation of material fact to the United States Securities and Exchange Commission (SEC) on SEC Form D in violation of 18 U.S.C. § 1001. Richard was sentenced to five years' imprisonment on each count of racketeering and racketeering conspiracy, and one year on each of the counts of mail fraud and making a false statement, all to be served concurrently. Douglas Scott was convicted of all the same counts as his brother, except for the false statement to the SEC, and received a sentence of three years' imprisonment on each of the racketeering and racketeering conspiracy charges, and one year each on the 44 counts of mail fraud, all to be served concurrently. Both Scotts also received six years of probation, and were each ordered to pay restitution in the amount of $4,270,620. They each appeal their convictions and elected to proceed pro se. We affirm.

The Scotts were convicted based upon numerous fraudulent activities that they engaged in between 1983 and 1985, in relation to the operation of five of their many limited partnerships.[1] For example, the Scotts spend a significant sum of partnership money for purposes unrelated to the partnerships, such as paying off personal debt. Some individuals received partnership shares at reduced rates or without paying any cash investment as required by the Confidential Offering Memoranda (COM's), in exchange for relieving the Scotts of personal debt owed to them. Later, the Scotts began to insert a "borrowing provision" at the end of some of the limited partnerships' COM's allowing them to borrow money from the partnership at no interest or ten percent per annum. Further, the Scotts repeatedly purchased property privately and then sold it to one of the partnerships a few weeks later for a significant profit. The Scotts also failed to pay both the rents due

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[1] The five limited partnerships were Mortgage Fund VII, Group 54, Group 61, Wheaton Oaks, and Thanksgiving Day Special 1984 ("TGS-84"). The two enterprises that the Scotts were charged with using to facilitate their scheme were Elwyn, Willbert & Haig, Inc. ("EWH") and IRE Inc. (including IRE Inc.'s related companies: IRE Services, Inc.; Investors Real Estate; IRE Investments, Inc.; and IRE Properties) (collectively referred to as "IRE").

and the required monthly payments for the TGS-84 partnership. Finally, the Scotts fraudulently obtained and used letters of credit. Investors were not informed of any of these practices.

Sufficiency of the Evidence

The Scotts assert that there was insufficient evidence for them to be convicted of all counts. In bringing a sufficiency of the evidence challenge, the Scotts face a "nearly insurmountable hurdle." *United States v. Hickok*, 77 F.3d 992, 1002 (7th Cir.) (quoting *United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir. 1992), *cert. denied*, 116 S. Ct. 1701 (1996). We "consider the evidence in the light most favorable to the Government, defer to the credibility determination of the jury, and overturn a verdict only when the record contains no evidence regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* (citations and internal quotations omitted). In determining if there was sufficient evidence we resolve all conflicts in the evidence in favor of the prevailing party. *Frazell v. Flanigan*, 102 F.3d 877, 822 (7th Cir. 1996); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996).

The Scotts' sufficiency argument for Counts One through Sixty-Nine[2] is based on their challenge to the credibility of the testimony of two government witnesses, Mr. Jonikas, an employee of the U.S. Attorney's Office, and Mr. Thullen, an accounting expert. The Scotts assert that these witnesses testified falsely. The jury apparently found the testimony of Jonikas and Thullen to be credible, even after they were cross-examined extensively concerning their allegedly false testimony. (*See, e.g.*, Tr. Vol. 7 at 1027-28, Tr. Vol. 17 at 2799-2815, 2859-69, 2871-73). The Scotts invite us to "re-assess credibility and re-weigh the evidence...." *Hickok*, 77 F 3d at 1006. We decline this invitation, because "[i]t is not the task of this appellate court to reconsider the evidence or assess the credibility of the witnesses." *United States v. Mojica*, 984 f 2d 1426, 1435 (7th Cir. 1993). We will not second-guess a jury on credibility issues. Therefore, as the Scotts'

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[2] These counts include all of the charges except for the charge of making a false statement to the SEC.

sufficiency argument relies on the credibility of these witnesses, we find that there was sufficient evidence to convict them on Counts One through Sixty-Nine.

Richard also challenges the sufficiency of the evidence for his conviction on Count Seventy, which charged him with knowingly and willfully making a false statement and misrepresentation of material fact on an SEC Form D for the TGS-84 Limited Real Estate Partnership.[3] (First Superseding Indictment, R. 5 at 110). Richard argues several different theories in an attempt to explain why we should find that there was insufficient evidence to affirm the conviction on Count Seventy , all of which fail. Richard first asserts that he never actually made the statement, which is similar to his unsuccessful argument at trial that his secretary was responsible. (Tr. Vol. 22 at 3367-68), however his signature appeared twice at the end of the form above a bolded statement that read "ATTENTION: Intentional misstatements or omissions of fact constitute Federal Criminal Violations (See 18 U.S.C. 1001)." (Appellants' App. at 198).

Richard also asserts that he listed $601,020 because it was the number used in the TGS-84's Confidential Offering Memorandum's Estimated Use of Proceeds chart, and he thought it

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[3] The stated objectives of TGS-84 were "to purchase a 5,000 square foot furnished office building at 1135 Wheaton Oaks Court in Wheaton, Illinois, and a 16.7% interest in Group P Partnership...." (COM, Appellants' App. at 31-32; SEC Form D, Appellants' App. at 194). Richard Scott stated on the SEC form that $601,020 of proceeds from TGS-84 were used to purchase real estate. (Appellants' App. at 197; Tr. Vol. 17 at 2889-90). However, testimony was given by Jonikas illustrating that less than $400,000 was actually used to purchase the real estate. (Tr. Vol. 18 at 2964-72, 2972). Jonikas testified that government exhibit E-13, part of a bankruptcy filing for TGS-84, stated that on January 1, 1985, three months prior to filing Form D, the purchase price of the office property was given. Jonikas further testified that on the same page the cost of purchase for interest in the Group P Partnership was also given. (Tr. Vol. 18 at 2969).

was a reasonable interpretation of the "proposed to be used" language of the form. (*Id.* at 64-65). However, by the end of 1984, all but $1,200 of the approximate $700,000 in partnership funds had been used and the SEC Form D is dated March 4, 1985. (Tr. Vol. 6 at 934-35, 947 (discussing expenditures from accounts); Appellants' App. at 198 (showing date the form was signed as March 4, 1985)). Therefore, Richard would have known exactly how the money had been spent prior to filing the form with the SEC. Additionally, Richard's similarly false statements on three other SEC forms further demonstrate his intent to give incorrect information. (Tr. Vol.. 18 at 2972-85).

Richard's last assertion is that his statement was an answer to an ambiguous question[4] (Appellants' Br at 63-64). Scott relies on *United States v. Vesaas*, 586 F.2d 101, 104 (8th Cir. 1978), which states, "a prosecution for a false statement under § 1001 or under the perjury statutes cannot be based on an ambiguous question where the response *may* be literally and factually correct." *Id.* (emphasis in original). However, as already pointed out, Richard was aware of how the partnership money had been spent prior to submitting the form. Therefore, the question was not ambiguous and could only have been answered by stating how the money was used.

Once again, Richard's allegations call for us to draw inferences and reweigh evidence which we will not do. *Hickok*, 77 F.3d at 1006. Therefore, viewing the evidence in the light most

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[4] The question states, "Indicate below the amount of the adjusted gross proceeds to the issue (*other than amounts specified in Item 5.b above*) proposed to be used or used for each of the purposes listed below. If the amount to be used for any purpose is not known, furnish an estimate and place an "X" in the box to the left of the amount given." (Appellants' App. at 197). The form stated that the amount for purchase of real estate was $601,020. (*Id.*). However, as an "X" was not placed in the box, this number could only be the amount used or amount proposed to be used. (*Id.*).

favorable to the government, there was sufficient evidence for a jury to find guilt beyond a reasonable doubt for all counts.

Actual Amendment of Indictment

The Scotts contend that their Fifth and Sixth Amendment rights were violated when the district court, prior to trial, granted the government's motion to strike paragraph 12[5] of Count Three from the indictment. The Fifth Amendment right referred to is the right to have an indictment by a grand jury and the Sixth Amendment right is for a person to be informed of the charges against them.

They assert that striking this single paragraph from a 74-paragraph count was an amendment which "broadened the indictment so as to present the trial jury with different offenses and less specific offenses." (Appellants' Br. at 56; *see id.* at 56-62). The Scotts complain that this bankruptcy scheme was incorporated into 68 of the other 69 counts by reference[6] and that the deletion of

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[5] Paragraph 12 states:

> It was further a part of the scheme that in or about October, November, and December, 1985, in an attempt to maintain operating control of the partnerships and prevent the limited partners from having a receiver appointed to manage the partnerships in their stead, defendants RICHARD E. SCOTT and DOUGLAS W. SCOTT caused bankruptcy petitions to be filed under Chapter 11 for Group 54, Group 61, Wheaton Oaks, and TGS-84, as well as personal bankruptcy petitions and bankruptcy petitions for approximately 35 other limited partnerships and entities.

(R. 5 at 23; Appellants' App. at 127).

[6] Each of the mail fraud counts state that the grand jury, "realleges and incorporates by reference paragraphs One through Seventy-Three of Count Three of this indictment as though fully set forth herein." The Scotts argue that this amendment changed the

the paragraph resulted in an actual physical amendment of the indictment without resubmitting it to the grand jury in violation of their constitutional rights, which requires reversal per se. The Scotts assert that as a result of this deletion they were surprised and denied the use of defenses to the bankruptcy aspect which they had concentrated on preparing for two and a half years prior to their trial. (Reply Br. at 24). Although the Scotts' objection to the motion to strike paragraph 12 may not have preserved these specific grounds on appeal, the government has waived waiver by stating that they assume the Scotts did not forfeit this argument. *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991); (Appellee's Br. at 30).

In *Leichtnam*, we stated that it is a harmless narrowing of an indictment that does not detract from the right to a grand jury, when, as in this case, "a single count of an indictment charges more than one commission of the same offense (or more than one way of committing it) yet either the evidence, the instructions to the jury or both cover only one--or the indictment is physically amended to charge only one." *Leichtnam*, 948 F.2d at 375 (citing *United States v. Miller*, 471 U.S. 130, 140-45 (1985)). The Supreme Court has expressly rejected "the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it...." *Miller*, 471 U.S. at 144.

> To generalize...a conviction will not ordinarily be upset because the proof at trial or the jury instructions cover fewer offenses than the indictment charged or only narrower or "lesser included" offenses--at least not without specific evidence that any departure from the strict terms of the indictment either surprised the defendant and prejudiced his or her defense or created a risk of double jeopardy.

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single bankruptcy scheme to defraud into a series of schemes which did not include the bankruptcy aspect.

Leichtnam, 948 F.2d at 377; see also *United States v. Duff*, 76 F.3d 122, 126 (7th Cir.) ("a prosecutor may elect to proceed on a subset of the allegations in the indictment, proving a conspiracy smaller than the one alleged"), *cert. denied sub nom., Hill v. United States*, 117 S. Ct. 148 (1996). We have consistently allowed an amendment to an indictment when it does not change an "essential" or "material" element of the charge and does not prejudice the defendant. *United States v. Spaeni*, 60 F.3d 313, 315 (7th Cir), *cert. denied*, 116 S. Ct. 536 (1995). The Scotts were certainly aware that they were being charged with mail fraud and were therefore not prejudiced by the removal of a single paragraph relating to bankruptcy that was unnecessary to the offense of mail fraud. Therefore, the Scotts' constitutional rights were not violated nor were the offenses they were charged with broadened by the striking of the single paragraph that dealt with bankruptcy.

Constructive Amendments of Indictment

The Scotts argue that the indictment was also constructively amended by the government and the court. (Appellants' Br. at 11-26). "A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994).

The Scotts assert that the government constructively amended the indictment by its opening statement, evidence presented at trial, and closing argument. They complain that the government: submitted three additional SEC Form D's that all allegedly contained false statements, but were not identified in the indictment; presented as evidence 40 allegedly false statements in the COM's; and, stated in its closing that "any lie about any of those things to any investor and they're guilty," and "[a] llie [sic] is a false statement you know is false." (Tr. Vol. 28, at 4373, 4389; *see* Appellants' Br. at 22). The Scotts also assert that the court constructively amended the indictment by not specifically stating in its jury instructions that the false writing instruction for Richard referred solely to Count Seventy. The Scotts argue that because of

this vague jury instruction and evidence presented by the government the jury could have convicted Richard on all counts in the indictment if they found that he made a single false statement. Additionally, they assert that this alleged broadening of the bases of conviction also affected Douglas under the requirements of the conspirator jury instruction.

The Scotts did not raise an objection to the jury instructions before the district court as required by Fed. R. Crim. P. 30.[7] An instruction that was not challenged at the trial court may be reviewed for plain error. *United States v. Maloney*, 71 F.3d 645, 663 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 295 (1996). However, the government asserts, based on *United States v. Lakich*, 23 F.3d 1203, 1207 (7th Cir. 1994), that the Scotts waived this claim as opposed to merely forfeiting it, and are not even entitled to plain error review because they expressly "offered no objection" to the government's proposed jury instruction on a violation of 18 U.S.C. § 1001. (R. 138, Defendant's Objections to Proposed Jury Instructions at 5; Appellee's Br. at 31, 31 n. 7); *see United States v. Olano*, 507 U.S. 725, 733 (1993) (outlining the distinction between forfeiture and waiver); *Maloney*, 71 F.3d at 663.

"Some panels of the court ... relying upon the distinction between forfeiture and waiver outlined in *United States v. Olano*, 507 U.S. 725, 733 (1993), have held that the failure to object to an instruction constitutes a waiver of that objection and thus plain error review does not apply." *Maloney*, 71 F.3d at 663. However, these cases, "perhaps out of an abundance of caution, have nonetheless discussed the objection under the plain error standard." *Id.* Accordingly, we review the jury instruction for plain error.

We have the discretion to reverse for plain error only where the trial court's error is clear, prejudicial, and affects substantial

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[7] Rule 30 provides in pertinent part that, "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."

rights. *Olano*, 507 U.S. at 732-35; Fed. R. Crim. P. 52(b). "Thus, even where the trial court has made an error, 'the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial' and affected the outcome of the trial." *United States v. Benitez*, 92 F.3d 528, 533 (7th Cir. 1996) (quoting *Olano*, 507 U.S. at 734). In other words, in order for us to reverse, "the amendment must constitute a mistake so serious that but for it the [defendant] probably would have been acquitted.'" *United States v. Feinberg*, 89 F.3d 333, 339 (7th Cir. 1996) (quoting *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 997 (1997). We should not reverse, unless in our discretion, we find the plain error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Benitez*, 92 F.3d at 533 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Count Seventy of the indictment refers only to making a false statement with respect to SEC Form D for the TGS-84 limited partnership, however, the government presented evidence of numerous other general false statements and three false statements in Form D's for other limited partnerships. The jury instructions did not specify which specific statement was referred to in the indictment. (R. 147, Jury Instructions; Appellants' App. at 67; Tr. Vol. 28 at 4420-21). Therefore, the jury instructions may at first appear to have unconstitutionally broadened the charges from those set forth in the indictment. *See Leichtnam*, 948 F.2d at 379-81 (reversing conviction where indictment mentioned use of one specific firearm and evidence of two other guns had been presented and the jury instructions merely referred to the use of "a firearm"). However, plain error did not occur in this case because not only was the redacted indictment attached to the jury instructions, but more importantly, the jury instructions stated: "You have heard evidence of acts of the defendants other than those charged in the indictment. You may consider this evidence only on the question of knowledge and intent. This evidence is to be considered by you only for this limited purpose." This limited purpose is clearly allowed under Fed. R. Evid. 404(b) and we have held that this use does not constitute a constructive amendment. *Leichtnam*, 948 F.2d at 379.

Moreover, contrary to the Scotts' contentions, the instruction on County Seventy did not prejudice Richard with respect to the other counts, nor did it prejudice Douglas with respect to his convictions. The instructions are considered as a whole, not individually in a vacuum. *United States v. Young*, 997 F.2d 1204, 1208 (7th Cir. 1993); *United States v. Machi*, 811 F.2d 991, 995 (7th Cir. 1987). The jury instructions specifically state that separate from the mail fraud charges, Richard was charged with "making a false statement to the Securities and Exchange Commission." (R. 147, Jury Instructions; Appellants' App. at 80). Additionally, the jury instructions state that in order to find the defendant guilty on each of the mail fraud schemes "as described in the indictment," the jury must find that each proposition has been proven beyond a reasonable doubt. (R. 147, Jury Instructions; Appellants' App. at 72).

Similarly, the convictions of Douglas were not prejudiced by the instruction pertaining only to Richard because the jury was informed that separate consideration should be given to each defendant and that they should not consider evidence admitted solely against one defendant when considering the charges against the other. (R. 147, Jury Instructions; Appellants' App. at 87). The court also explicitly instructed the jury to disregard closing arguments when they are not supported by the evidence. (R. 147, Jury Instructions; Appellants' App. at 76).

The Scotts also assert that plain error was committed when the jury was improperly given a copy of the indictment that still contained paragraph 12 from Count Three, which had been stricken prior to trial.[8] (Appellants' Br. at 51-52; Appellants' Reply Br. at 16-17; R. 147, First Superseding Indictment at 23). However, the district court specifically instructed the jury that the indictment was not evidence and did not create any inference of guilt. (R. 147, Jury Instructions; Appellants' App. at 79; Tr. Vol. 28 at 4420-21). Further, the jury was properly instructed that in order to find guilt,

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[8] The Scotts admit that they failed to object to the submission of the indictment to the jury. (Appellants' Reply Br. at 16).

the government must have proved "that the defendant knowingly devised and participated in the scheme to defraud as described in the indictment." (R. 147, Jury Instructions; Appellants' App. at 72; Tr. Vol. 28 at 4416).

Even assuming that the failure to redact the stricken bankruptcy paragraph was an error of constitutional dimension, it does not require reversal as the government has met its burden of proving that it was harmless error. *United States v. Klein*, 93 F.3d 698, 704-5 (10th Cir.), *cert. denied* 117 S. Ct. 624 (1996); *United States v. Edmond*, 52 F.3d 1080, 1112-13 (D.C. Cir.), *cert. denied*, 116 S. Ct. 539 (1995). "A defendant is only entitled to a new trial if there is a reasonable possibility that the evidence had a prejudicial effect upon the jury's verdict." *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996). Further, as already stated, the jury was informed that the indictment was not evidence. The well recognized means for demonstrating harmlessness is to show the existence of overwhelming evidence of the defendants' guilt, as was done in this case. *Id.* at 705. After objectively reviewing the record, even under the assumption that the submission of the indictment was constitutional error, we are satisfied beyond a reasonable doubt that it did not contribute to the verdict. *Klein*, 93 F.3d at 704; *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989).

Prosecutorial Misconduct

Lastly, the Scotts assert that the prosecutors engaged in numerous types of misconduct during the trial, depriving them of liberty without due process. (Appellants' Br. at 26-53). The Scotts first complain that the government failed to notify them of its intention to use Alvydas Jonikas as an expert witness during discovery and failed to meet the requirements of Fed. R. Crim. P. 16(a)(1)(E).[9]

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[9] Rule 16(a)(1)(E) states:

> At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of

Prior to the trial the government provided the Scotts with the charts that summarized the cash flow of the partnerships and informed them that Jonikas would be called as a witness in order to place all of the charts into evidence. (Tr. Vol. 5 at 767). The government did not identify Jonikas as an expert witness, nor has it conceded that Jonikas gave expert testimony. The district court treated Jonikas as an expert witness but allowed the testimony because it did not deprive the Scotts of a fair trial.

Douglas objected to Jonikas' testimony as an expert witness and is therefore entitled to have this issue reviewed for abuse of discretion. Richard, however, never raised this objection and only receives a review for plain error. The district court did not abuse its discretion, or commit plain error, in allowing Jonikas' testimony.

> [Rule 16] does not mandate the suppression of evidence for a discovery violation. These sanctions are left to the discretion of the court, and we will not second guess its decision. A new trial would be warranted "only if the government violated Rule 16 and the remedy offered by the district court was inadequate to provide him with a fair trial."

United States v. Jackson, 51 F.3d 646, 652 (7th Cir. 1995) (internal citations omitted) (quoting *United States v. Mounts*, 35 F.3d 1208, 1217 (7th Cir. 1994)). Therefore, Jonikas was properly permitted to define several accounting terms and testify concerning the limited partnerships.

The Scotts also contend that the prosecutors conspired with Jonikas to present false testimony, engaged in fraudulent trial tactics, and presented the false testimony of Thullen at trial.

> the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

> "In order to receive a new trial on the basis of the government's use of allegedly perjured testimony, the defendant must establish that: (1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is a likelihood that the false testimony affected the judgment of the jury."

United States v. Saadeh, 61 F.3d 510, 523 (7th Cir.), *cert. denied*, 116 S. Ct. 521 (1995). The Scotts had an adequate opportunity to expose any alleged perjury on cross-examination. *Id.* Additionally, these are essentially claims that go to credibility and questions of inferences to be drawn from the evidence, which we have already discussed under the sufficiency of the evidence analysis. Therefore, the Scotts failed to meet their burden of showing that false testimony had been presented.

The judge also cured any allegedly defective statements of law made by the government in its closing by informing the jury: "Members of the jury, you will be instructed on the law that pertains right after these closing arguments." (Tr. Vol. 28 at 4401). The court also informed the jury that the lawyers' statements were not evidence, the jury had a duty to follow the court's instructions on law, the jury must not question the rules of law stated by the court, and the jury's verdict must be based on the application of the law given by the court to the facts in this case. (R. 147, Jury Instructions; Appellants' App. at 73, 76; Tr. Vol. 28 at 4404-4).

The Scotts additionally assert that the prosecutors improperly gave their personal opinions by stating that the defendants had lied and had admitted guilt in their defense efforts. These alleged errors are reviewed for plain error because the Scotts did not object to these statements at trial. "The government's arguments were not improper. Where the character and credibility of the defendant[s] are at issue and the evidence allows the inference that the defendant has been less than truthful, the prosecutor does not err in closing argument by referring to the defendant as a liar." *United States v. Catalfo*, 64 F.3d 1070, 1080

(7th Cir. 1995) (explaining that a prosecutor only goes too far if the "references to the defendants' veracity are intemperate and excessive"), *cert. denied*, 116 S. Ct. 1683 (1996). Additionally, the jury was informed that closing arguments were to be disregarded unless supported by the evidence.

The Scotts also present several claims of prosecutorial misconduct that are meritless on their face. For example, they contend that the prosecution's use of the term "judge" and Judge Norgle" to refer to Judge Norgle created an implication of an impartial alliance. The Scotts also assert that the prosecution "struck foul blows" and behaved in an unprofessional manner by speaking in a loud manner and waving papers during the cross-examination of Richard. The court instructed the prosecutor not to wave papers and several objections to the raising of his voice were sustained. The prosecutors did not engage in misconduct.

Even if prosecutorial misconduct had occurred, reversal is not warranted. Reversal will not be ordered unless in considering the misconduct in the context of the entire record, we determine that its effect was to deny the defendant a fair trial. *United States v. Lindemann*, 85 F.3d 1232, 1244 (7th Cir.) , *cert. denied*, 117 S. Ct. 392 (1996). The Scotts received a fair trial and we do not find any of their arguments for reversal persuasive.

For the foregoing reasons the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 1, 1997

Before

Hon. Joel M. Flaum, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Appeal from the United States District Court for The Northern District of Illinois, Eastern Division

Nos. 95-2078 & 95-2097

No. 92 CR 226

Charles R. Norgle, Sr., *Judge.*

DOUGLAS W. SCOTT and
RICHARD E. SCOTT,

Defendants-Appellants.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Appellants on March 31, 1997, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.